

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Donney Shawyn Council, # 5049,
aka Donney Shawyn Whyte Council,

Plaintiff,

vs.

Robert Stewart;
Gov. Mark Sanford;
SLED Agency;

Defendants.

) C/A No. 3:06-618-HMH-JRM

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) Report and Recommendation

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The plaintiff Donney Shawyn Council is a state prisoner proceeding *pro se*. He seeks relief pursuant to 42 U.S.C. § 1983. Under the provisions of 28 U.S.C. §636(b)(1)(B), and Local Rule 73.02(B)(2)(d), D.S.C., this magistrate judge is authorized to review all pretrial matters in prisoner cases filed under § 1983 and submit findings and recommendations to the District Court.

PRO SE COMPLAINT

As noted above, the plaintiff is a *pro se* litigant. This Court is required to liberally construe *pro se* documents, Estelle v. Gamble, 429 U.S. 97 (1976), holding them to a less stringent standard than those drafted by attorneys. Hughes v. Rowe, 449 U.S. 9 (1980) (*per curiam*). Even under this less stringent standard, however, a *pro se* complaint is subject to summary dismissal. The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so, but a district court may not rewrite a petition to include claims that were never presented, Barnett v. Hargett, 174 F.3d 1128,

1133 (10th Cir. 1999), or construct the plaintiff's legal arguments for him, Small v. Endicott, 998 F.2d 411, 417-18 (7th Cir. 1993), or “conjure up questions never squarely presented” to the court, Beaudett v. City of Hampton, 775 F.2d 174, 1278 (4th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986).

SECTION 1915 SCREENING

The complaint *sub judice* has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without paying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action “fails to state a claim on which relief may be granted” or is “frivolous or malicious.” § 1915(e)(2)(B)(i), (ii).

1) Frivolous

A finding of frivolity can be made where the complaint “lacks an arguable basis either in law or in fact.” Denton v. Hernandez, 504 U.S. 25, 31 (1992). Hence, under § 1915(e)(2)(B), a claim based on a meritless legal theory may be dismissed *sua sponte*. Neitzke v. Williams, 490 U.S. 319 (1989); Allison v. Kyle, 66 F.3d 71 (5th Cir. 1995). The court may dismiss a claim as “factually frivolous” under § 1915(e) if the facts alleged are clearly baseless. Denton, 504 U.S. at 31. In making this determination, the court is not bound to accept without question the truth of the plaintiff's allegations, but rather need only weigh the plaintiff's factual allegations in his favor. Id. The Supreme Court has held that

a court may dismiss a claim as factually frivolous . . . if the facts alleged are “clearly baseless,” a category encompassing allegations that are “fanciful,” “fantastic,” and “delusional.” As those words suggest, a finding of factual frivolousness is

appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them.

Denton, 504 U.S. at 32 (citations omitted). See *a/so Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994) (“‘[F]antastic’ or ‘delusional’ claims are clearly baseless and thus insufficient to withstand a charge of factual frivolity.”), cert denied, 514 U.S. 1022 (1995).

The plaintiff has named Robert Stewart, Governor Mark Sanford, and SLED as defendants. However, even construing the Plaintiff’s complaint liberally, the factual allegations are clearly baseless. The complaint is rambling, incomprehensible, and manifestly delusional. The entire complaint appears to be written in some form of code using numbers and repetitive words. Furthermore, numerous words are stricken out making it impossible to read. As the plaintiff’s complaint is incomprehensible, this case should be **dismissed without prejudice** as frivolous.

2) Failure to State a Claim

Under Fed. R. Civ. P. 8(a)(2), a plaintiff is required to provide a “short and plain statement of the claim showing that the pleader is entitled to relief.” A plaintiff must at least present the court with complete declarative sentences in order for the court to ascertain his right to relief, if any. Brown v. Zavaras, 63 F.3d 967 (10th Cir. 1995). See *a/so Adams v. Rice*, 40 F.3d 72 (4th Cir. 1994)(affirming the district court’s dismissal of plaintiff’s suit as frivolous where allegation was conclusory and nonsensical on its face).

Even liberally construing the plaintiff’s complaint, it provides no factual allegations to support any claim and thus provides no notice to the defendants of the causes(s) to which they must respond and no notice to this Court of the claims upon which relief might

be granted. Therefore, it is recommended that this case be **dismissed without prejudice** for failure to state a claim.

Recommendation

Accordingly, it is recommended that the complaint in the above captioned case be **dismissed without prejudice** and without requiring the defendants to file a return. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966); *see a/so* Neitzke v. Williams, 490 U.S. 319, 324-25 (1989); Haines v. Kerner, 404 U.S. 519 (1972). **The plaintiff's attention is directed to the important notice on the next page.**

Respectfully Submitted,

s/Joseph R. McCrorey
United States Magistrate Judge

April 26, 2006

Columbia, South Carolina

Notice of Right to File Objections to Magistrate Judge's "Report and Recommendation"
&
The Serious Consequences of a Failure to Do So

The plaintiff is hereby notified that any objections to the attached Report and Recommendation (or Order and Recommendation) must be filed within **ten (10) days** of the date of its filing. 28 U.S.C. § 636 and Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three days for filing by mail. Fed. R. Civ. P. 6. Based thereon, this Report and Recommendation, any objections thereto, and the case file will be **delivered to a United States District Judge** fourteen (14) days after this Report and Recommendation is filed. Advance Coating Technology, Inc. v. LEP Chemical, Ltd., 142 F.R.D. 91, 94 & n. 3, 1992 U.S. Dist. LEXIS® 6243 (S.D.N.Y. 1992). A magistrate judge makes only a recommendation, and the authority to make a final determination in this case rests with the United States District Judge. See Mathews v. Weber, 423 U.S. 261, 270-271 (1976); and Estrada v. Witkowski, 816 F. Supp. 408, 410, 1993 U.S. Dist. LEXIS® 3411 (D.S.C. 1993).

During the ten-day period, but not thereafter, a party must file with the Clerk of Court specific, written objections to the Report and Recommendation, if he or she wishes the United States District Judge to consider any objections. **Any written objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** Failure to file written objections shall constitute a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the United States District Judge. See United States v. Schronce, 727 F.2d 91, 94 & n. 4 (4th Cir.), *cert. denied*, Schronce v. United States, 467 U.S. 1208 (1984); and Wright v. Collins, 766 F.2d 841, 845-847 & nn. 1-3 (4th Cir. 1985). Moreover, if a party files specific objections to a portion of a magistrate judge's Report and Recommendation, but does not file specific objections to other portions of the Report and Recommendation, that party waives appellate review of the portions of the magistrate judge's Report and Recommendation to which he or she did not object. In other words, a party's failure to object to one issue in a magistrate judge's Report and Recommendation precludes that party from subsequently raising that issue on appeal, even if objections are filed on other issues. Howard v. Secretary of HHS, 932 F.2d 505, 508-509, 1991 U.S.App. LEXIS® 8487 (6th Cir. 1991). See also Praylow v. Martin, 761 F.2d 179, 180 n. 1 (4th Cir.) (party precluded from raising on appeal factual issue to which it did not object in the district court), *cert. denied*, 474 U.S. 1009 (1985). In Howard, *supra*, the Court stated that general, non-specific objections are *not* sufficient:

A general objection to the entirety of the [magistrate judge's] report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the [magistrate judge] useless. * * * This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act. * * * We would hardly countenance an appellant's brief simply objecting to the district court's determination without explaining the source of the error.

Accord Lockert v. Faulkner, 843 F.2d 1015, 1017-1019 (7th Cir. 1988), where the Court held that the appellant, who proceeded *pro se* in the district court, was barred from raising issues on appeal that he did not specifically raise in his objections to the district court:

Just as a complaint stating only 'I complain' states no claim, an objection stating only 'I object' preserves no issue for review. * * * A district judge should not have to guess what arguments an objecting party depends on when reviewing a [magistrate judge's] report.

See also Branch v. Martin, 886 F.2d 1043, 1046, 1989 U.S.App. LEXIS® 15,084 (8th Cir. 1989) ("no de novo review if objections are untimely or general"), which involved a *pro se* litigant; and Goney v. Clark, 749 F.2d 5, 7 n. 1 (3rd Cir. 1984) ("plaintiff's objections lacked the specificity to trigger *de novo* review"). This notice, hereby, apprises the plaintiff of the consequences of a failure to file specific, written objections. See Wright v. Collins, *supra*; and Small v. Secretary of HHS, 892 F.2d 15, 16, 1989 U.S.App. LEXIS® 19,302 (2nd Cir. 1989). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections addressed as follows:

Larry W. Propes, Clerk
 United States District Court
 901 Richland Street
 Columbia, South Carolina 29201